IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-525

DONALD SCHANBARGER, Petitioner,

v.

JOHN J. McNULTY, JR., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS OF THE UNITED STATES

DONALD SCHANBARGER
Petitioner Pro Se
Salem, New York 12865

May 20, 1976

September, 1976 recasted reprint

ROBERT LYMAN Esq., Respondent's Attorney
County Courthouse, Albany, New York 12207

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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS OF THE UNITED STATES

The petitioner Donald Schanbarger respectfully prays that a writ of certiorari issue to review the order of the Second Circuit Court of Appeals of the United States of April 30, 1976.

OPINION BELOW BY ORDER

U.S. District Court for the Northern District of New York, appears in the Appendix 1-14 hereto. Second Circuit Court of Appeals of the United States appears in the Appendix 14-16 hereto.

JURISDICTION

The April 30, 1976 Order of the Second Circuit Court of Appeals of the United States affirmed the 5/5/75 Order of U.S. District Court for Northern New York. Assurted are 42 USC Sec. 1983, U.S. Constitution's Article 3 Sec. 2 and 5th, 8th, 9th, 10th & 14th Amendments. Petition is under USC Sec. 1254(1) to estab-

lish that all classes of people can assurt rights against anyone of the class of government agents, and filed within 30 days.

QUESTIONS PRESENTED

1. Whether A FEDERAL COURT FAILING TO TAKE JUDICIAL NOTICE OF THE UNITED STATES CONSTITUTION WITH OR WITHOUT REQUEST, VIOLATES THE PERSONAL RIGHTS CLAUES OF THE 8th, 9th, & 10th AMENDMENTS AND EQUAL PROTECTION, PROHIBITED STATE CONDUCT AND DUE PROCESS CLAUSES OF THE 5th & 14th AMENDMENTS OF THE FEDERAL CONSTITUTION, WHEN EVERY MEMBER OF THE UNITED STATES JUDICIARY HAVE AGREED TO SUPPORT IT AS A CONDITION OF THEIR OFFICE AS SUCH A MEMBER? (In Complaint)

2. Whether a county sheriff in failing to supply his inmates in his jail with access to a library with criminal law books

that would be needed to defend one's self from incarceration violates the equal protection, prohibited state conduct and due process clauses of the 14th amendment of the federal Constitution, when a hired defence whether innocent or guilty falls within the doctrine of waste? (In motion paper at District Court)

The issues are whether the 14th AMENDMENT of the FEDERAL CONSTITUTION requires a county sheriff to supply his inmates with facilities to:

(a) Obtain writing paper at will for legal mail,

(b) To place mail for mailing more then 3 days a week, or 2 days a week should one day fall on a federal holiday,

(c) To mail legal mail that is not on printed stationary.

(d) Dental care with the exception of ex-

extracting teeth,

(e) Access to a library with criminal law books that would be needed to defend ones self from incarceration, and

(f) Jail clothes.

And if an injunction against future incarceration of anyone without such facilities, and punitive and exemplary damages, costs and attorney fees are assignable for the lack thereof, all of which a district court must take judicial notice with and/or without request?

STATEMENT OF THE CASE

Donald Schanbarger when incarcerated in a county jail by Sheriff JOHN J. McNULITY, was not supplied facilities that he would had used to:

(a) Obtain writing paper at will for legal mail,

(b) To place mail for mailing more then

3 days a week, or 2 days a week should one day fail on a federal holiday,

(c) To mail legal mail that is not on printed stationary,

(d) Dental care with the exception of extracting teeth,

(e) Accers to a library with criminal law books that would be needed to defend ones self from incarceration, and

(f) Jail clothes.

Donald Schanbarger moved for an injunctions against future incarceration of anyone without such facilities, punitive and exemplary damages, cost and attorney fees under 42 USC Sec. 1983 violations of the federal Constitution's 14th Amendment's equal protection, due process and prohibited state conduct clauses, with Article 3 Sec. 2 claimed. Motion was made before answer to the Complaint,

that it be dismissed, which it was by the District Court over the objection of the plaintiff. The framed questions on p. 3-4 herein were raised as indicated. The dismissal of the Complaint is based on poor pleading and insufficiency. The dismissal of the Complaint was affirmed by the Court of Appeals.

REASONS TO GRANT WRIT

1. To establish that COMITY does not mean that the CONSTITUTION means nothing among friends.

2. To re-enforce JOHNSON v AVERY, 393 US 483, respecting to legal assistance.

3. To support CAMPBELL v BETO, 460 F2d 765, that medical treatment is a right.

4. To re-enforce CARTER v STRANTON, 405 US 669, that one need not exhaust State remedies for Federal judicial relief.

5. To establish that inmates may not be required to subsidize incarceration.

CONCLUSION

For these reason, a writ of certiorary should issue to review the order and with the opinion so held, to the Seoond Circuit Court of Appeals of the United States.

Submitted,

DONALD SCHANBARGER
Petitioner Pro Se

May 20, 1976

September, 1976 recasted reprint

UNITED STATES DISTRICT COURT

DONALD SCHANBARGER,

Plaintiff,

-against 75-CV-93

JOHN J. McNULTY, JR.,

Defendant.

APPEARANCES: OF COUNSEL:

DONALD SCHANBARGER
Pro Se
Salem, New York 12865

ROBERT P. ROCHE — Albany County Attorney
TERENCE L. KINDLON — Assistant Albany County Attorney
Albany County Court House
Albany, New York 12207

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

This plaintiff filed a pro se two-page

civil rights complaint and paid the fees for filing and service of process upon the single named defendant, Sheriff John J. McNulty, Jr. The complaint assumedly drawn by this layman, a dairy farmer in Washington County, succinctly and clearly sets forth the jurisdictional grounds and the general factual allegations based upon which constitutional violations are alleged to have occurred. The jurisdiction is asserted under the familiar 42 U.S.C. 1983, "and equal protection, due process and prohibited state conduct clauses of the 14th amendment of the United States Constitution."

The essential factual allegations to be appraised are set forth in paragraph 3 of the complaint:

> Between October 7th thru 30th 1974, the plaintiff was incarcerated in de-

fendant's jail known as the Albany County jail, where plaintiff was not supplied facilities to:

(a) Obtain writing paper at will for legal mail.

(b) To place mail for mailing more then 3 days a week, or 2 days a week should one mail day fall on a federal holiday.

(c) To mail legal mail that is not on jail printed stationary.

(d) Dental care with the exception of extracting teeth,

(e) Access to a library with criminal law books that would be needed to defend ones self from incarceration.

(f) Jail clothes.

Judgment is demanded against the defendant Sheriff "injoining (sic) incarceration of any person without providing facilities of this complaint, for $30,000. as exmplary (sic) and punitive damages, for costs, and for attorney fees."

In behalf of the defendant Sheriff, a formal motion was filed by the Albany County Attorney, specifically pursuant to Fed. R. Civ. P. 12(b) (6) to dismiss ground they fail to state claims upon which relief can be granted. The motion is supported by the affidavit of Assistant County Attorney Terence L. Kindlon and the attached Exhibits "A", "B" and "C". Exhibit "A" is an affidavit of Warden Beam that details the mailing regulations existent in the Albany County Jail, the provision for emergency dental care to ex-

tract teeth, and the acess to criminal law books allowed inmates. The plaintiff in writing countered this motion by a motion to deny this motion for dismissal "on grounds of poor faith". The motions were heard in open court, and the plaintiff presented his own argument in person, and it developed during the argument that he was wearing the same civilian clothes that he wore during his 90-day jail confinement and which he says should have been replaced by prision garb to lessen the wear and tear upon his own clothes. I asked the plaintiff if he wanted me to appoint a lawyer to assist him in presenting further briefing. He said he though he could handle it and he filed a brief described as "Sumitted after argument", and it does set forth adequately case and text reference that are

in point and relate to the issues he claims have federal substances. It is apparent that plaintiff is devoting substantial time to the abundance of writing now existent concerning prisoner problems and the ever increasing resort to the federal courts for their presentation and review. There are noted rulings that complaints of this kind are to be treated with extreme liberality by the federal courts in the determination whether sufficient is alleged to warrant an opportunity to offer supporting evidence concerning the constitutional violations and deprivations. See Haines v. Kerner, 404 U.S. 519 (1972); Wilwording v. Swenson, 404 U.S. 249 (1971). Equally so this liberalism is to be balanced by the admonition that federal courts do not have the responsibility to supervise the general

administration of prisons and prison officials must be accorded the widest latitude in the administration of prison affairs, and prisoners are subject to appropriate rules and regulations. Cruz v. Beto, 405 U.S. 319, 321 (1972); see also Procunier v. Martinez, 416 U.S. 396, 404-405 (1974). The violations and deprivations must amount to ones of constitutional stature, and in my view under settled federal case law, the only ones asserted here arguably so would be (d) and (e) of paragraph three of the complaint concerning dental care and access to criminal law books. In the oral argument, plaintiff described that his complaint about his personal dental care involved a filling or the need of one, and the failure to have an accumulation of criminal law books pertinent to his particular in-

volvement with the law. In this context, neither in my judgment as presented create issues reasonable acceptable as one of federal constitutional magnitude.

In his complaints about the mailing privileges, there is no contention that the result was denial of access to the courts. See Cristman v. Skinner, 468 F.2d 723 (2d Cir. 1972); Wright v. McMann, 460 F.2d 126 (2d Cir. 1972). Correctional facilities and county jails have a right to regulate a prisoner's mail and federal courts do not interfere with such regulations. See Procunier v. Martinez, 416 U.S. 396 (1974); Wolff v. McDonnell, 418 U.S. 539 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

Medical treatment claim must allege deliberate indifference to its need and I assume dental treatment would come un-

der the same rationale. Corby v. Conboy, 457 F.2d 251 (2d Cir. 1972); U.S. ex rel, Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970); Church v. Hegstrom, 416 F2d 449 (2d Cir. 1969); see also for extreme lack of proper medicial treatment and necessary equipment, Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974), cert. den., Alabama v. Newman, ___ U.S. ___, 4/28/75, 43 U.S. Law Week 3580. There is nothing of this nature contended from the reading of the allegations or developed in the oral agument of the plaintiff. The law book deprivation is lacking the same detail and substance in the form made and does not rise to constitutional stature. See Johnson v. Avery, 393 U.S. 483 (1969); Younger v. Gilmore, 404 U.S. 15 (1971), aff'g Gilmore v. Lynch, 319 F. Supp. 105 (ND Cal. 1970).

There is no intention in this writing to belittle the sincerity of the plaintiff in his alleged grievances. The plaintiff was courteous and preasant in his oral argument, and frank and straightforward in response to court questions at that time. However, in my opinion, the grievances do not rise to the necessary constitutional level that warrant their entertainment and decision by a federal district court. The practices and conduct complained of conformed with State rules and regulations. These problems should be for the responsible state administrators whose duty under the State Constitution is to "visit and inspect ... all institutions used for the detention of sane adults charged with or convicted of crime." N.Y. State Constitution, Article XVII, Sec. 5. The management of

the jails is controlled by detailed regulations which can be enforced by the State Commission of Correction. See 7 N.Y. Codes, Rules and Regulations, Chapter XXX, Part 5100 et seq.

The complaint is dismissed in its entirety for failure to state any viable claims under the federal civil rights statutes upon which relief can be granted. The formal motion of the defendant in that regard is granted, and the countermotion of the plaintiff against dismissal is denied.

It is so Ordered.

Dated: May 5, 1975

Albany, New York

/S/ James T. Foley

UNITED STATES DISTRICT JUDGE

42 U.S.C. Sec. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunites secured by the constitutional laws, shall be liable to the parties injured in an action at law, suit and equity, or other proper proceeding for redress.

U.S. CONSTITUTION, 14th AMENDMENT

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Thirtieth day of April one thousand nine hundred and seventy-six.

Present:

HONORABLE J. EDWARD LUMBARD

HONORABLE STERRY R. WATERMAN

HONORABLE THOMAS J. MESKILL

Circuit Judges,

DONALD SCHANBARGER,

Plaintiff-Appellant,

v. #75-7302

JOHN J. MC NULTY, JR.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of New York

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it is hereby affirmed on the

opinion below.

/s/ J. Edward Lumbard

J. EDWARD LUMBARD

/s/ Sterry R. Waterman

STERRY R. WATERMAN

/s/ Thomas J. Meskill

THOMAS J. MESKILL

Circuit Judges

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76—525

DONALD SCHANBARGER,

Petitioner,

v.

JOHN J. McNULTY, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

ROBERT G. LYMAN
Albany County Attorney
THOMAS J. WALSH
Of Counsel
Attorney for Respondent
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(518) 445-7608

December 13, 1976

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In the

Supreme Court of the United States

October Term, 1976.

No. 76-525.

DONALD SCHANBARGER,

Petitioner,

v.

JOHN J. McNULTY, Jr.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the District Court is set forth in the petition (App. 1-11). The opinion of the Court of Appeals is set forth in the petition (App. 14-16).

Jurisdiction.

Jurisdiction is asserted under 42 U.S.C. §1983, and the equal protection, due process or prohibited state conduct clauses of the 14th Amendment of the United States Constitution.

Question Presented.

Whether the plaintiff while incarcerated in the Albany County Jail was deprived of civil rights to enable him

to institute an action under 42 U.S.C. §1983 as alleged in his complaint, for injunctive relief and exemplary and punitive damages, costs, and attorneys' fees.

Statement.

The Petitioner in the instant case filed a Summons and Complaint of Denial of Constitutional Rights on February 26th, 1975 in the United States District Court for the Northern District of New York.

The Summons and Complaint was served upon John J. McNulty, Jr., the Sheriff of Albany County. The Albany County Attorney's office appeared for the above named defendant. The Albany County Attorney moved on behalf of the respondent to dismiss all the claims in the complaint on the grounds they failed to state claims upon which relief could be granted. In support of the motion and attached to the affidavit were Exhibits A, B and C. Exhibit A was an affidavit of the Warden of the Albany County Jail, Robert E. Beam. Exhibit B was an affidavit of the Assistant Secretary of the New York State Commission of Correction, Lawrence Palmateer. Exhibit C are parts of 7 N. Y. Codes, Rules and Regulations, Chapter XXX, Section 5100.5 *et seq.*

The motion was before James T. Foley, District Judge who entertained oral argument, and reserved decision. On May 5th, 1975 the District Judge entered a five (5) page opinion dismissing the complaint in its entirety for failure to state any viable claims under the Federal Civil Rights Statutes upon which relief could be granted. A formal motion of the respondent in that regard was granted and the counter motion of the Petitioner against dismissal was denied.

The Petitioner thereafter appealed to the United States Court of Appeals for the Second Circuit. The matter came on the 30th day of April, 1976. The Court of Appeals for the Second Circuit affirmed the opinion of the District Court on the opinion below. A petition for a writ of Certiorari to the Second Circuit Court of Appeals of the United States was submitted May 26th, 1976. On information and belief the petition was refused and was reprinted and submitted in October of 1976.

The Petitioner in this particular case was confined to Albany County Jail. The length of confinement was October 7th, 1974 to October 30th, 1974. On information and belief the Petitioner was confined for a period of ninety (90) days but released on his own petition and appeal by order of the County Judge on October 30th, 1974. The Petitioner in his complaint sets forth simply stated allegations which allege that between the dates of October 7th, 1974 and October 30th, 1974, the Petitioner while incarcerated in defendant's jail known as the Albany County Jail, was not supplied facilities to obtain writing paper at will for legal mail, was unable to place mail for mailing more than three days a week, or two days a week should one fall on a federal holiday, was unable to mail legal mail which was not on jail printed stationery, was denied dental care with the exception of extracting teeth, was denied access to a library with criminal law books which would be needed to defend one's self from incarceration, was denied jail clothes. The complaint states that the respondent willfully denied the Petitioner's rights guaranteed under the 14th Amendment of the Federal Constitution. He alleges that there was a denial by a Governmental Officer of the State of New York and that the Petitioner would have used the facilities if they were made more readily available.

The Petitioner on argument of the motion admitted in Court that he was wearing the same civilian clothes he wore during his twenty-three (23) day confinement. He indicated he should not have to wear his own clothes as this would be supporting his own incarceration. He did not want to support his own incarceration during that period of time and clothing should have been issued to him to wear while he was in confinement. The Petitioner also indicated that he desired to have a dental filling while he was in jail, and that this dental filling should have been given to him. There was no allegation in the complaint or on oral argument that he was suffering from any pain or dental or gum disorder, producing pain.

On oral argument, also, the Petitioner indicated to the Court that he was not happy with the selection or accumulation of law books in this County Jail facility and he wanted a more extensive library, pertinent to his particular involvement with the law.

There was no allegation in the complaint nor upon oral argument and the Petitioner was denied access to the Court. It was brought out on oral argument that the Petitioner was not denied mailing privileges nor access to any attorney or court. Medical or dental care was not denied, and the limited confinement County Jail, did have criminal law books available. Clothes or prison garb are not mandatory under confinement to the County Jail.

Argument.

The complaint does not state facts sufficient to form viable causes of action under 42 U.S.C., §1983, depriving the Petitioner of or violating his Constitutional Rights. The issue in the present case is uniquely narrow, and confined to Petitioner's particular problem. It does not

arise to one of an overall factual pattern affecting many, but is created, flows and is confined to the Petitioner only. The District Judge in dismissing the complaint, realized it and in conjunction therewith took into consideration the oral argument, answers and reasons set forth by the Petitioner in his Court. He gave great consideration to these as is noted in his decision. He extended great liberality in considering the situation, noting in particular the body of law calling for a most favorable interpretation of a *pro se* complaint.

The Judge was correct in his decision and explained his thoughts clearly and adequately with full understanding of the law. He indicated the liberal interpretation of a *pro se* complaint should be balanced by the admonition that the Federal Courts do not have the responsibility to supervise the overall general administration of prison affairs or County jails. Jail officials must be accorded the widest latitude in administration of the affairs of their institution and prisoners are subject to appropriate rules and regulations. Administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. *Cruz v. Beto,* 405 U. S. 319, 31 L. Ed. 2d 263 (1972). See also *Procunier v. Martinez,* 416 U. S. 396, 404-405, 40 L. Ed. 224, 94 S. Ct. 1300 (1974). There is no burning constitutional question present and there is no showing that there was a violation or deprivation which amounted to one of a constitutional statute. In the period of the claimant's confinement, writing paper was issued to the inmates three (3) times a week, prior to the days of mailing. Mailing was conducted on Monday, Wednesday and Friday except when a federal holiday excluded mailing. A Commission of Correction, which is responsible for the overall administration of State

Prisons and County Jails requires that an official inspection stamp shall be placed on the stationery of both incoming and outgoing letters containing the name of the jail or penitentiary, date and initials of the designated employee who inspected the correspondence. The rules and regulations also provide that prisoners may write outgoing letters only on County issued or other authorized stationery (7 N. Y. Codes, rules and Regulations, Chapt. XXX §5100.5 *et seq.*).

The Petitioner does not complain that he was denied access to the mails. His complaint is that he had to use County issued paper and he wanted the paper more than three (3) times per week. The regulations require that at least one outgoing letter per week shall be allowed with postage provided at the County expense. In this particular case before the Court the County jail allowed additional mailing, namely two other times per week or three times per week. No allegation was made that the jail did not mail his letters or that he was deprived of mailing privileges. There is no allegation of censored mail which results in denial of access to the Courts. The issue as to mailing seems to turn on the fact that the Petitioner does not wish to mail his legal mail on jail provided stationery and wants mailing privileges more than three (3) days per week. The claimant in this case was not denied access to the Courts and certainly was not denied legal mail. He did petition while incarcerated, and was released from jail on October 30th, 1974.

The State Commission of Correction promulgates rules and regulations calling for jail authorized stationery. It requires a minimum provision for mail which may be exceeded by the local facility and which was in this particular case. It also provides that special correspondence with the attorney or any court and most government officials shall not be read or censored.

The jail facilities were operated by the respondent within the guidelines provided by the New York Commission of Correction and did not infringe upon any constitutional rights of the Petitioner. There was not present in this particular case a violation by prison regulation or practice, of the First Amendment rights the inmate has in regard to mailing. There is no broad, sweeping curtailment of the First Amendment freedom and regulations and conduct of mailing are a proper function of the prison officials in the interest of security, order, rehabilitation and administration. *Procunier v. Martinez*, 416 U. S. 396, 404-405, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1973).

There was access to a library with criminal law books provided to inmates during the period of incarceration, October 7th, 1974 through October 30th, 1974. There is no allegation that the petitioner was denied access to a library with criminal law books and it would appear from oral argument and from the allegation that the Petitioner would have liked a set of law books, peculiar to his own confinement. The Petitioner's argument was that he was an unwilling ward of the Sheriff who should not be expected to subsidize his incarceration in any way, and that he should be provided with particular books, peculiar to his needs. His complaint was that the bibliography which he wanted or required was not available. This at first glance would seem reasonable until you consider the fact that his confinement was cut short by his own ability to petition and appeal for his release with facilities available in the form of paper and library. This library facility did not deny him access to the Courts. He was able to adequately use the facilities provided. The Petitioner is not in jail and has never been confined to jail for his involvement with the law since his release on October 30th, 1974.

The allegation of the access to a library with criminal law books which would be needed to defend one's self from incarceration does not rise to the level of a constitutional question. The Petitioner challenging the law library contents, asking for specified materials has the burden of showing that the right to reasonable access to the Courts and to equal protection of the law were affected by regulations or the existence of the particular library. This has not been met in this particular case. Access to the Courts was available to the Petitioner and he did get relief sought through the facilities provided. The Petitioner was not indigent or uneducated and there is no allegation of this in the complaint. His legal needs appeared to be adequately provided for and he demonstrated a certain amount of legal expertise. On this point there is no deprivation of civil right rising to the statute of a constitutional question to cause this court to grant the Petition for Certiorari. Problems demonstrated in *Younger v. Gilmore,* 404 U. S. 15, 1971, affirming *Gilmore v. Lynch,* 319 F. Supp. 105 (ND Cal. 1970), do not arise in this particular case. There is no detail or substance to the complaint that would warrant entertainment by the Court.

The claimant's complaint that jail clothes were not provided to him is an insufficient allegation to show a deprivation of a civil right which would entitle him to bring a cause of action under 42 U.S.C. §1983. The New York State Codes and Regulations do not require that jail clothing be supplied to inmates in County jails or County Penitentiaries. The State Commission of Correction does state that clothing items should be checked and if necessary should be cleaned prior to storage or if they are to be worn by the prisoner during his detention. This Petitioner's main complaint and only complaint was that he was an unwilling ward of the Sheriff and he was not going to help support the Sheriff in maintaining him in confinement. Therefore, he wanted to have less wear and

tear on his clothing by having a suit of jail clothes issued to him. The Petitioner was in a short term facility from which he was released after twenty-three (23) days. The Petitioner did not allege and did not show that the clothing he had on was inadequate for his personal protection, comfort, warmth or modesty. In fact, it was brought out in court five and one half months later that the Petitioner was wearing the same clothing worn during his jail confinement. It was noted by the Judge in questioning the claimant that the claimant's basic argument was that the prison garb should have been provided to lessen the wear and tear on his own clothes. There is no constitutional question demonstrating a violation or deprivation of right issue to grant certiorari.

The Federal District Court took into consideration the allegation, "dental care with the exception of extracting teeth."

The claimant on oral argument indicated that he wanted to maintain his personal dental care which involved a filling or the need for one. He indicated that he would like a filling. There was no allegation made that the Petitioner was in pain. There was no allegation made that the Petitioner had the need for emergency medical care or any medical care other than the Petitioner's remedial requirements, that he would like a filling while in jail.

The Petitioner failed to allege on oral argument and could not embellish that there were any "acts or omissions which were sufficiently harmful to demonstrate a level of indifference."

It was indicated that emergency dental care for extraction of teeth was provided inmates during the period of confinement, October 7th to October 30th, 1974. Rules and Regulations of the State Commissioner of Corrections provide that arrangements should be made that will insure

the transportation of a prisoner to a hospital in emergency situations and provide necessary supervision by duly authorized facility personnel during the period of hospitalization. It indicates that maximum use should be made of local community medical and mental health facilities, services and personnel. This is done in the situation involving the Albany County Jail where an emergency situation arises or the need for medical care occurs. There is absolutely no allegation that the Petitioner was denied adequate medical attention in regards to any serious problem which was brought to the attention of the warden. The complaint lacks a charge of deliberate indifference by prison authorities to a prisoner's request for essential medical treatment sufficient to state a claim. The complaint is not embellished by oral argument to show that the desire for remedial dental care of a single filling is a serious medical problem.

There is no showing in this case of an outstanding lack of medical treatment or facilities which would require intervention such as was required in *Newman v. Alabama.* The desire to have a dental filling does not reach the stage of an allegation of deliberate indifference to need. All claims must allege this deliberate indifference to need and there is nothing of this nature contended from the reading of the allegation in the complaint or developed in the oral argument of the Plaintiff. The cause of action on this point should be denied and the District Court was proper and correct in dismissing the complaint. *Corby v. Conboy,* 457 F. 2d 251 (2d Cir. 1972); *U. S. ex rel. Hyde v. McGinnis,* 429 F. 2d 864 (2d Cir. 1970); *Church v. Hegstrom,* 416 F. 2d 449 (2d Cir. 1969); *Newman v. Alabama,* 503 F. 2d 1320 (5th Cir. 1974), cert. den. *Alabama v. Newman,* 421 U. S. 948, 44 L. Ed. 2d 102, 95 S. Ct. 1680; *Estelle v. Gamble,* U. S. , 11/30/76 docket no. 75-929, Oct. 1976 Term.

The overall grievances do not rise to the necessary constitutional level which warrant their entertainment and decision by this Court on certiorari. The decision is clearly correct and does not appear to be one of a conflict of decision. There is no important question of federal law involved. The Federal District Court reviewed the matter in detail and gave great leeway to the Petitioner in his oral argument. The Court had a firsthand knowledge and impression of what the complaint was about. It delved into it with the Petitioner, and as can be seen from the Court's decision, it understood the allegations and complaints and saw that there were no constitutional questions involved. The Court of Appeals for the Second Circuit reviewed the entire record upon transmittal to it and affirmed on the opinion of the Federal District Judge that the grievances did not give rise to a viable cause of action under 42 U.S.C. §1983.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

December 13, 1976.

Respectfully submitted,

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